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No. 02-403

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

CHRISTINE BEAUMONT, ET AL.,
Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

MARY E. ALEXANDER
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of Trial Lawyers of America

JEFFREY ROBERT WHITE*
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
** Counsel of Record*
Attorney for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters granting consent of the parties to the filing of this brief have been filed with the Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. ATLA is also a nonprofit corporation which has established and maintained ATLA-PAC, a separate segregated fund under 2 U.S.C. § 441b, to allow voluntary participation by ATLA members in federal election campaigns.

In ATLA's view, Congress in the Federal Election Campaign Act struck a careful balance. By requiring corporations that wish to make federal campaign contributions to do so only through a separate segregated fund protects First Amendment rights. At the same time, it safeguards the electoral process from the corrosive influence of direct corporate spending and donations to candidates for federal office.

ATLA's experience in operating its separate segregated fund has been that the administrative requirements imposed by the FEC serve important governmental interests and are not so onerous as to discourage protected political speech. ATLA is concerned that the decision below undermines Congress' efforts to protect our most fundamental democratic institution.

SUMMARY OF THE ARGUMENT

1. In an effort to protect federal elections from the corrosive influence of corporate campaign spending, Congress prohibited corporations from spending their own general funds in federal campaigns. At the same time, Congress protected the First Amendment rights of individuals affiliated with corporations by authorizing corporations to establish separate

segregated funds so that stockholders, certain employees and "members" of corporations can voluntarily contribute to election activities, subject to prescribed limits and disclosure requirements.

The court below erred in holding this portion of the Federal Election Campaign Act unconstitutional as applied to North Carolina Right to Life, Inc., a nonprofit corporation devoted to political advocacy. The underlying premise of this decision is that the administrative requirements for setting up and operating a PAC are so onerous as to discourage small nonprofit organizations like NCRL from doing so.

The lower court failed to establish the essential foundation for its as-applied ruling. Because the court held that the statute and regulations were facially constitutional, it was NCRL's burden to show that the administrative requirements were too costly for it to comply.

The lower court erred in comparing the administrative requirements facing NCRL with those of a hypothetical unincorporated association. Examination of these requirements shows that the burdens they impose are not significantly greater than the burdens that nonprofit corporations already bear because of state law or other reasons apart from § 441b.

Additionally, an affirmance by this Court of the decision below would likely result in a mere advisory opinion. NCRL would remain prohibited from making direct candidate contributions by its decision to qualify for tax exempt status as a 501(c)(4) organization.

2. Even if this Court should determine that the FEC's administrative requirements amount to a burden on First Amendment rights, that burden is justified by the government's compelling interest in protecting the electoral process from corruption and the appearance of corruption.

This Court's previous decision creating an exemption from § 441b on First Amendment grounds for certain nonprofit corporations wishing to make independent expenditures does not require the same result for those wishing to make candidate contributions. Restrictions on expenditures reduce political speech and thus infringe on First Amendment rights to a far greater degree than limits on contributions. Additionally, while NCRL's members enjoy a First Amendment right of association, the corporation itself has no separate right of its own to associate with political candidates.

At the same time, the government's interest in preventing corruption is far more compelling in the context of candidate contributions than for independent expenditures. Preventing *quid pro quo* corruption of federal officials justifies the restrictions imposed by FECA.

3. The lower court also erred in determining exemption from § 441b for nonprofit corporations to make campaign expenditures is available to a nonprofit that has accepted small amounts of funds from business corporations. This Court limited that exemption to nonprofits whose policy is not to accept such contributions. The lower court's expansion of the exemption opens the door to business corporations seeking to funnel funds into federal campaigns through nonprofits, precisely the harm Congress sought to prevent.

ARGUMENT

I. FEDERAL ELECTION CAMPAIGN ACT REQUIREMENTS FOR ESTABLISHING AND OPERATING A SEPARATE SEGREGATED FUND BY A CORPORATION DO NOT IMPOSE A SUBSTANTIAL BURDEN ON FIRST AMENDMENT RIGHTS.

The Federal Election Campaign Act of 1971, provides, in part:

> It is unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election.

2 U.S.C. § 441b(a).

For nearly a century, Congress has been concerned with protecting the democratic process from the influence of corporate money on federal elections. *See FEC v. National Right to Work Committee*, 459 U.S. 197, 208-09 (1982) [hereinafter "*NRWC*"]; *United States v. Automobile Workers*, 352 U.S. 567, 570-84 (1957).

Although § 441b(a) bans corporate officers from simply drawing on the corporation's general funds to support the candidate of their choice, Congress did "not stifle corporate speech entirely." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). Rather, Congress enabled individuals affiliated a corporation to participate in voluntary political activity under the sponsorship of the corporation. FECA authorizes a corporation to make expenditures for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political

purposes by a corporation," including a "corporation without capital stock." 2 U.S.C. § 441b(b)(2)(C). Such a fund is commonly referred to as a political action committee, or PAC. The corporation may solicit PAC funds from stockholders, certain employees, or the "members" of a corporation without capital stock. 2 U.S.C. § 441b(b)(4)(C). The PAC in turn may make both direct contributions and independent expenditures in connection with federal elections. 2 U.S.C. § 441b(b).

This Court has recognized that, while financial support for candidates implicate First Amendment values, "a separate segregated fund that makes contributions to candidates . . . under our decision in *National Right to Work Committee*, must be established by all corporations wishing to make such candidate contributions." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 n.13 (1986)[MCFL].

A. The Decision Below Was Not Based On Any Finding That Compliance With §441b Would Be Unduly Burdensome To NCRL.

The court below disagreed that "all corporations" must comply with the congressional scheme. The court ruled that, as applied to Respondent North Carolina Right to Life, Inc. ["NCRL"], the statute and two regulations promulgated thereunder, 11 C.F.R. 114.2 and 114.10, violated the First Amendment. Specifically, the court stated, "many small groups may be unable to bear the substantial costs of complying with these regulations." Pet. at 15a. The court concluded that the requirements imposed a substantial burden on the exercise of First Amendment rights. Pet. at 17a.

Because the court of appeals, like the district court, held that § 441b and its regulations were constitutional on their face, Pet. at 30a, NCRL bore the burden of demonstrating that, alternatively, the provisions were unconstitutional as applied to it. NCRL, however, failed to show how great a burden the administrative requirements imposed upon it and whether it is "unable to bear the substantial costs" of compliance.

In fact, NCRL has set up its own PAC. *See North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 709 (4th Cir.1999), *cert. denied,* 528 U.S. 1153 (2000); *see also* Pet at 55a n.2. It could easily have demonstrated with some precision its actual administrative costs to establish and operate the fund. It did not. Consequently, the court below lacked the foundation for its "as applied" ruling.[2]

B. Compliance With Regulations Governing Separate Segregated Funds Is Not So Onerous As To Discourage the Exercise of First Amendment Rights.

Instead, the lower court was content with presenting a list of the administrative requirements for setting up and operating a separate segregated fund under § 441b(a). Pet. at 14a-15a. The court characterized these staffing, recordkeeping and

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2 The court borrowed heavily from this Court's discussion in Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). As the district court noted, NCLR's Complaint stated that it engaged in "minor business activities" and accepted some funds from business corporations. Pet. at 51a. NCRL thus differed from MCFL in two of the three features this Court pronounced "essential" to its holding in that case. 479 U.S. at 263.

disclosure requirements as "additional burdens" that "stretch far beyond the more straight-forward disclosure requirements on unincorporated associations." Pet. at 13a-14a. The court had "little difficulty" in concluding that the "practical effect" of these requirements was to "burden the exercise of political speech and association." Pet. at 16a-17a.

The court applied the wrong test. The court properly inquired whether the administrative requirements, when applied to NCRL, are so onerous as "to discourage protected speech [ ] sufficient to characterize § 441b as an infringement on First Amendment activities." *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986) [hereinafter *"MCFL"*]; see Pet. at 15a-16a. However, the answer does not lie in comparing burdens imposed on NCRL with those required of some hypothetical unincorporated association. The FEC did not command NGRL to adopt the corporate form.

The proper focus in this "as applied" challenge should be on whether § 441b imposes burdens on NCRL that are substantially greater than those it would bear if – as it desires – it were exempted from § 441b requirements.

ATLA itself is organized as a nonprofit corporation and operates a separate segregated fund under § 441b. Consequently, ATLA is well aware of the administrative costs associated with setting up and operating a PAC. It has been ATLA's experience that the burdens imposed by § 441b are not substantially greater than the burdens that a nonprofit corporation engaged in the same activities would bear in the absence of § 441b.

The court below listed ten FEC administrative requirements that it deemed so burdensome as to discourage political speech. Pet. at 14a-15a. Examination of these requirements indicates that they are less burdensome, and in some cases are duplicative of, requirements that nonprofit corporations must comply with, quite apart from § 441b.

Four of the quoted FEC requirements deal with setting up a separate segregated fund.[3]

1. Filing a statement of organization containing (1) its name and address; (2) the name of its custodian of records; and (3) its banks, safety deposit boxes, or other depositories, §§ 433(a) and (b).

Every state requires a corporation organized under state law to file articles of incorporation that include this and other information, except for item (3). *See, e.g.*, Del. Gen. Corp. Law, 8 Del. C. § 102 (2001); ALI-ABA, Model Nonprofit Corporation Act, § 2.02 (1987). It is difficult to imagine that a small nonprofit, even one with several bank accounts or deposit boxes, would require more than an hour to prepare this statement.

Most nonprofit corporations seeking tax exempt status must file a detailed informational return with the Internal Revenue Service. *See* IRS, Form 990: "Return of Organization Exempt From Income Tax" (2001). The FEC's requirement is modest by comparison.[4]

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3 For clarity, ATLA addresses the ten requirements in slightly different order than the lower court did.

4 The IRS estimates that even the short-form 990EZ, designed for organizations with less than $100,000 in revenues,

2. Reporting any change in the above information within 10 days, § 433(c).

Again, the FEC requirement is less burdensome than state-law requirements already imposed upon corporations. Nearly all states require periodic filing of information concerning a corporation and its personnel, regardless of whether that information has changed. *See* West's McKinney's Forms, Business Corporation Law § 3:12A (2002); *see, e.g.*, D.C. Code § 29-301.83 (2001) (requiring informational report to be filed by nonprofit corporations every two years); ALI-ABA, Model Nonprofit Corporation Act, § 16.22 (1987) (requiring annual informational reports).

3. Appointing a treasurer, § 432(a).

Regardless of whether state law requires the naming of a treasurer, *cf.*, ALI-ABA Model Nonprofit Corporation Act, § 8.40 (1987) ("Unless otherwise provided in the articles or bylaws, a corporation shall have a president, a secretary, a treasurer . . ."), any corporation involved in raising money and disbursing funds designates a responsible individual to handle those funds. The FEC requirement imposes no additional burden.

4. Terminating only upon filing a written statement that it will no longer receive any contributions or make any disbursements, and that it has no outstanding debts or obligations, § 433(d)(1).

State laws already obligate a corporation upon termination to file a certificate of dissolution or

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the average time required to prepare the form is over 14 hours and the time required for recordkeeping is over 28 hours. IRS, "Instructions for Form 990 and 990EZ" 43 (2001).

similar document with the appropriate state official. *See, e.g.*, Del. Gen. Corp. Law, 8 Del. C. § 278 (2001); ALI-ABA, Model Nonprofit Corporation Act 14.03 (1987).

Three additional requirements listed by the lower court involve receipts and disbursements.

5. Forwarding contributions to the treasurer within 10 or 30 days of receiving them, depending on the amount, § 432(b)(2).

6. Ensuring that the treasurer keeps an account of (1) every contribution regardless of amount; (2) the name and address of anyone who makes a contribution in excess of $50; (3) all contributions received from political committees; and (4) the name and address of every person to whom a disbursement is made regardless of amount, § 432(c).

7. Preserving receipts for all disbursements over $200 and all records for three years, §§ 432(c) and (d).

Even apart from its general obligations under state law, *see* ALI-ABA, Model Nonprofit Corporation Act, § 16.01 (1987) ("A corporation shall maintain appropriate accounting records"), every responsible organization that receives and disburses funds – including those engaged in social welfare and political activity – follows internal procedures for handling funds and preserving records that are at least as rigorous as those required by the FEC. Moreover, , a detailed list of current donors and their donations is likely to be one of the most valuable assets of a nonprofit corporation, which can be expected to maintain it diligently.

Two requirements cited by the court below relate to disclosure:

8. Filing either (1) monthly reports with the FEC; or (2) quarterly reports during election years, a pre-election report no later than the 12th day before an election, a post-election report within 30 days after an election, and reports every 6 months during nonelection years, § § 434(a)(4)(A) and (B).

9. Including in such reports information regarding (1) the amount of cash on hand; (2) the total amount of receipts in multiple categories; (3) the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, interest, or any other offset to operating expenditures in an aggregate amount above $200; (4) the total amount of all disbursements in numerous categories; (5) the names of all authorized or affiliated committees to which transfers have been made; (6) persons to whom loan repayments or refunds have been made; and (7) the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation, § 434(b).

Even unincorporated organizations and those exempted from § 441b as qualified nonprofit corporations must comply with certain FEC reporting requirements, including the names of contributors of more than $200 and the names and addresses of recipients of more than $200. See 2 U.S.C. § 434(c). The FEC requirements for PAC disclosures are more exacting, but not unreasonably so.

Significantly, only four Justices in *MCFL* viewed the disclosure requirements of § 441b as a burden on First Amendment rights as applied.

Justice O'Connor parted company with the plurality on precisely this point, stating that "the burden of disclosing independent expenditures generally is 'a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.'" 479 U.S. at 265-66 (O'Connor, J., concurring in part), quoting *Buckley v. Valeo*, 424 U.S. 1, 82 (1976) Hence, the § 441b disclosure requirements cannot be viewed as an infringement of First Amendment rights.

10. That a group's segregated fund solicit contributions only from its "members," §§ 441b(b)(4)(A) and (C).

This requirement does not represent an administrative cost at all. It is a limitation on the permissible scope of solicitations for donations to the PAC.[5] Most importantly, this Court squarely held in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), that this restriction does not infringe upon First Amendment rights and is narrowly tailored to serve the compelling governmental interest "in preventing both actual corruption and the appearance of corruption of elected representatives." *Id.* at 208 & 210.

In sum, the "practical effect" of the administrative requirements associated with establishing and maintaining a separate segregated fund does not impose undue burdens beyond those

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5 Indeed, the practical effect of this limit on solicitation would be to minimize the fundraising costs to the PAC's corporate sponsor.

that nonprofit corporations routinely bear as a consequence of their choice to adopt the corporate form. To the extent that some requirements demand additional effort on the part of corporate sponsors of separate segregated funds, this Court has upheld the requirements as justified by compelling government interests.

C. Affirmance Would Result In a Mere Advisory Opinion Because NCRL Has Chosen a Tax Status That Precludes Contributions To Candidates.

NCRL is a nonprofit corporation exempted from federal income tax under I.R.C. § 501(c)(4). Pet. at 2a. As such, it has accepted certain restrictions on its political activity in exchange for tax exemption.

To qualify under § 501(c)(4), a nonprofit organization must be "operated exclusively for the promotion of social welfare." *Id.* Independent expenditures for advocacy and "[d]iscussion of public issues and debate on the qualifications of candidates," may be viewed as promoting social welfare. *Buckley v. Valeo, supra,* 424 U.S. at 14.[6]

However, making campaign contributions to particular candidates is not a permissible activity for such an organization. Treasury Regulations make clear that "promotion of social welfare does not

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6 The IRS has stated that the section did not impose "a complete ban" on "political campaign activities." Rev. Rul. 81-95 (1981). The Service thus appears to view some election-related advocacy as consistent with promoting social welfare. *See Developments in the Law -- Nonprofit Corporations*, 105 Harv. L. Rev. 1656, 1665 (1992).

include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." Treas. Reg. §1.501(c)(4)-1(a)(2)(ii) (as amended in 1990).

This restriction itself is consistent with the First Amendment. As this Court has explained, a tax exemption is a form of subsidy that "has much the same effect as a cash grant to the organization." *Regan v. Taxation With Representation Of Washington*, 461 U.S. 540, 544 (1983). As the Court stated in connection with a ban on lobbying in that case, Congress does not infringe upon First Amendment rights simply by refusing to subsidize their exercise. *Id.* at 546.

Even if the Court affirmed that NCRL is exempted from § 441b requirements, NCRL would remain subject to the ban on campaign contributions which it accepted in exchange for tax exemption.[7] Consequently, ATLA suggests, this Court's decision would amount to little more than an advisory opinion.

II. THE PROHIBITION AGAINST DIRECT CORPORATE CONTRIBUTIONS TO FEDERAL CANDIDATES IS FAR LESS AN INFRINGEMENT ON FIRST AMENDMENT

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7 Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a), including any qualified nonprofit corporation, to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501, et seq.

11 C.F.R. § 114.10(i).

RIGHTS THAN A PROHIBITION AGAINST INDEPENDENT EXPENDITURES AND SERVES A MORE COMPELLING GOVERNMENTAL INTEREST.

Even if this Court determines that 2 U.S.C. §441b imposes a substantial burden on First Amendment rights, that burden is outweighed by the compelling governmental interest at stake.

The court below relied heavily on *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ["MCFL"], which held that the administrative burden under § 441b of establishing a PAC was not justified by a compelling governmental interest, as applied to certain nonprofits wishing to make independent campaign *expenditures*.

The lower court in this case concluded that the *MCFL* rationale "is equally applicable in the context of direct contributions." Pet. at 25a. The court asserted that "the distinction between contributions and expenditures [is] immaterial in this case." *Id.* at 29a. ATLA submits that this distinction is constitutionally crucial, and the lower court's failure to recognize it fatally undermines its decision.

A. Requiring Corporations to Make Contributions Through a PAC Imposes Less of a Burden on Speech Than Requiring Corporations to Use a PAC for Independent Expenditures.

This Court has consistently recognized that "[FECA's] *expenditure* ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its

limitations on financial *contributions*." *Buckley v. Valeo*, 424 U.S. at 23. (emphasis added)

At the outset, the *MCFL* Court made clear that it did not view "the effect of additional reporting and disclosure obligations" as an additional burden on the speech of an organization's contributors. Rather, its concern was whether "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak." 479 U.S. at 255 n.7.

Protection of a corporation's speech differs from that accorded to individuals. This Court has carefully delineated between First Amendment protection of a natural person's right of self-expression and the protection of the "inherent worth of the speech in terms of its capacity for informing the public" regardless of whether its source is a corporation, a union or an individual. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978). "In the case of corporate political activities, we are not at all concerned with the self-expression of the communicator." *Id.* at 806 n.6. Rather, it is the second protection, "often referred to as the right to hear or receive information," which is at stake. *Id.* at 806.

Independent expenditures that seek to inform or persuade voters clearly increase the amount of "speech concerning public affairs [that] is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). They are deserving of First Amendment protection commensurate with the inherent worth of such speech. "Independent expenditures," the *MCFL* Court stated, "constitute expression 'at the core of our electoral process and of the First Amendment freedoms.'" at 251, citing

Buckley, 424 U.S., at 39; and *Williams v. Rhodes,* 393 U.S. 23, 32 (1968). *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) (independent expenditures "produce speech at the core of the First Amendment").

The same is not true with respect to candidate contributions. Such contributions add little to public discussion of political issues. Setting aside the protection of self-expression accorded only to natural persons, restriction of contributions "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley v. Valeo,* 424 U.S. at 21. Consequently, § 441b does not infringe upon protected speech by nonprofit corporations.

The lower court also held that § 441 infringed on NCRL's First Amendment right of political association. Pet. at 11a & 17a. The First Amendment clearly protects the right of individuals to associate together, *NAACP v. Alabama,* 357 U.S. 449, 460 (1958), and to associate themselves with a political candidate through the symbolic act of contributing to campaigns, *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976). This individual right is unaffected by § 441b. This Court has never held that corporations – including nonprofits – have a separate and independent First Amendment right to associate themselves with political candidates.

In view of their lesser infringement of First Amendment rights, this Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *MCFL* at 259-60.

B. FECA Serves a Compelling Interest In Preventing Corruption and the Appearance Of Corruption In Federal Elections.

At the same time, the dangers Congress sought to prevent by enacting § 441b are greater than those associated with independent expenditures, so that, this Court has stated, "the Government enjoys greater latitude in limiting contributions than in regulating independent expenditures." *MCFL* at 479 U.S. 261-262.

Section 441b, and its predecessor, the Federal Corrupt Practices Act, were enacted to rid the political process of the corruption and appearance of corruption that accompany contributions to and expenditures for candidates from corporate funds. *See NRWC, supra*, 459 U.S., at 207-208; *First National Bank of Boston v. Bellotti*, 435 U.S. at 788.

Congress' "overriding concern" was "the problem of corruption of elected representatives through the creation of political debts." *Bellotti, supra,* at 788 n.26; *NRWC, supra,* at 208. Recent abuses prompted Congress to address the problem that "contributions are given to secure a political *quid pro quo* from current and potential office holders, [undermining] the integrity of our system of representative democracy." *Buckley v. Valeo*, 424 U.S. at 26-27.

Independent expenditures, on the other hand, do not present as serious a threat to the integrity of the electoral system. As the *Buckley* Court explained:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an

> expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

424 U.S. at 47.

This Court's decision in *MCFL* does not support the lower court's decision. Even if NCRL is deemed equivalent to the nonprofit corporation in that case and the requirements imposed by § 441b are deemed a burden on First Amendment rights, NCRL is not entitled to exemption from those requirements for purposes of making direct candidate contributions. Compared to the restrictions on independent expenditures involved in *MCFL,* restrictions on contributions burden First Amendment rights to a lesser degree and are justified by a more compelling governmental interest.

Even as it established an exception to § 441b for certain nonprofits wishing to make independent expenditures, the *MCFL* Court made clear that "a separate segregated fund that makes contributions to candidates . . . must be established by all corporations wishing to make such candidate contributions." 479 U.S. at 264 n.13.

This Court should not retreat from that principled position.

III. FEDERAL ELECTION COMMISSION REGULATIONS PRECLUDING INDEPENDENT EXPENDITURES BY NONPROFIT CORPORATIONS THAT RECEIVE MONEY FROM FOR-PROFIT CORPORATIONS DO NOT VIOLATE FIRST AMENDMENT RIGHTS.

The court below also held that NCRL could not be prohibited under § 441b from using general funds for independent campaign expenditures, despite the fact that it received some funds from business corporations. Pet. at 21a. The lower court enlarged an exception to § 441b that this Court has narrowly circumscribed:

> MCFL has three features *essential* to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace."

MCFL, 479 U.S. at 263-64. (emphasis added).

The lower court redefined this Court's "essential" requirement that the nonprofit seeking exemption from § 441b adopt a "policy not to accept contributions" from business corporations to include accepting a "small amount of corporate contributions." Pet. at 6a n.2, citing the court's prior decision in *North Carolina Right to Life, Inc. v.*

Bartlett, 168 F.3d 705 (4th Cir. 1999). This redefinition completely undermines Congress' intent to restrict "the influence of political war chests funneled through the corporate form." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 501 (1985) [NCPAC].

Acting "to prevent both actual and apparent corruption," § 441b "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. NRWC at 209-10. Corporations "receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process." *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990).

As this Court has recognized, Congress felt the potential for undesirable influence warranted the application of restrictions on candidate contributions to "corporations and labor unions without great resources, as well as those more fortunately situated," and to "membership corporations, though contributions by the latter . . . might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." NCPAC, 470 U.S. at 500. This Court has declined to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210."

The *MCFL* Court's narrow exception for a nonprofit that has a "policy" not to accept funds from business corporations reflects deference to congressional intent. Congress was properly concerned that profit-making corporations should not be able to funnel their general funds into federal

elections. However, the Court concluded that the governmental interest in enforcing prophylactic safeguards against an influx of corporate money is not compelling where the policy of the nonprofits "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *MCRL*, 479 U.S. at 264.

The court below instead focused on the size of the funnel.

The court viewed NCRL's receipt of up to eight percent of its revenues from business corporations as comparatively "modest." Pet. at 21a. NCRL was therefore entitled to an exemption from § 441b requirements applicable to nonprofits that did not obtain "the overwhelming share of their donations from private individuals." Pet. at 22a. Such distinctions among corporations, however, are "distinctions in degree" rather than "differences in kind," and are more properly drawn by the legislature than by the judiciary. *Buckley v. Valeo*, 424 U.S. at 30.

Moreover, the court below opens a conduit for corporate spending that completely undermines the congressional objective. Congress was not concerned with preventing the influence of money from business corporations on nonprofits corporations. It was concerned with the influence of such money on federal elections. A stream of corporate funds that may be deemed a "modest" eight percent of the revenues of a nonprofit organization may yet exert a significant impact on a particular election campaign. It requires no great speculative power to foresee that business corporations wishing to funnel political war chests into campaigns could do so by contributing

"eight percenters" to a multiplicity of willing nonprofit organizations, all of which claim exemption from the disclosure requirements of § 441b under the lower court's analysis.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
ATLA Senior Amicus Counsel
Counsel of Record

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